No. 9786

IN THE 8

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

MOROLOY BEARING SERVICE OF OAKLAND, LTD. (a corporation),
Appellee.

On Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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JURISDICTION.

The statement as to the jurisdiction of this Court contained in Appellant's opening brief is accepted by Appellee.

QUESTION PRESENTED.

The question as stated by Appellant is not acceptable to Appellee because it mistates the determination of the Court below by assuming "sales" of automobile connecting rods contrary to the findings and conclusions of said Court. (R. 10, 17, 18.) The ques-

tion is therefore rephrased to correctly indicate the issue, as follows:

Does the repair and exchange of connecting rods for automobiles, which were not manufactured or produced by Appellee, constitute a sale which was taxable under Section 606(c) of the Revenue Act of 1932, which imposed a tax upon automobile parts "sold by the manufacturer, producer, or importer" thereof? The whole issue may be summarized as follows: Was the process of Appellee one of repair of an article and charge therefor, or one of manufacture and sale thereof?

STATUTE AND REGULATIONS INVOLVED.

Appellant has inserted only portions of Section 606 of the Revenue Act of 1932 and Regulations 46 as are adaptable to its argument for an enlarged interpretation thereof. In appendix hereto we quote the Sections and Article more fully.

STATEMENT.

The statement of facts contained in Appellant's brief contains subtle distortions of the facts, findings and conclusions of law in order to emphasize its contentions that Appellee was a "seller" and "manufacturer" of automobile connecting rods. It undoubtedly adopted this method and such terms because, unless Appellee was both "manufacturer" and "seller", it was not liable for tax under Sec-

tion 606(c) of the Revenue Act of 1932. Because of this, we restate the facts in simple form to disclose the real nature of Appellee's business and its methods.

The business of Appellee, in so far as it in anyway affects the issue in this appeal may be described briefly as that of repairing, through relining with babbitt metal, automobile connecting rods to fit them to crank shafts and exchanging such refitted rods, with a charge only for the service of rebabbitting, for other connecting rods from which the babbitt metal lining has been burned or worn out. It does not manufacture or produce the connecting rods which it repairs or exchanges. (R. 34, 35, 40-43.)

To further clarify Appellant's somewhat lengthy statement and point out the salient material feature of Appellee's business insofar as they may come within the inclusions or exclusions of Section 606(c) of the Revenue Act of 1932:

1. It is admitted that Appellee is not an importer of connecting rods. (R. 6.)
2. At the trial Appellant did not contend that Appellee was a producer of connecting rods but asserted that its process was one of manufacturing. (R. 51.)
3. Appellee does not manufacture or produce connecting rods, which are steel forgings, made in forging factories, and supplied directly to the automobile manufacturers. (R. 36, 55.)
4. The rebabbitting or relining of a connecting rod is a repair of the rod in order to make it fit

the crankshaft and in no way produces a new rod or alters an old one. (R. 34, 43, 60.)

5. The only service performed on a connecting rod by Appellee is its repair by rebabbitting or relining the inner surface of the connecting rod which is in contact with the crankshaft. (R. 60.) In performing this service it is occasionally necessary to replace old bolts, which hold the cap to the shank, and in some cases to supply new shims or bushings. (R. 48, 51, 53, 54.) Shims cost about ten cents per hundred, new nuts and bolts about two cents each, and bushings about two, three or four cents apiece and come to Appellee tax paid. (R. 62.) There is no charge or alteration in a rod after its receipt by Appellee, when it goes out to the customer it is in the same condition as when it came in with the exception of having a rebabbitted lining to make the bearing fit properly to the shaft. (R. 43.)

6. The time consumed in the entire process of repair is from fifteen to twenty minutes. (R. 63.)

7. Appellee's method of disposal of connecting rods which it repairs is to exchange a repaired rod for a worn rod and charge only for the repair, as though it had been made on the turned-in worn rod and the customer waited for direct delivery. (R. 71.) When a stock of rods is distributed to a jobber and no exchange rods are then received, Appellee charges the forgings to the jobber to protect itself, but when the ex-

change rod is received the customer is credited with the amount charged. This is not a sales transaction but one of record protection. (R. 41-42, 69-71.)

8. The manufacturer's tax on all connecting rods repaired by Appellee has already been paid by the manufacturers of the automobiles, which formerly contained them, as required by Section 606(b). What Appellant seeks to tax is the charge for repair and not the sales price of the connecting rod. (R. 36-40.)

9. The only connecting rods which came to Appellee came from automobiles in which they had been used. Appellee did not purchase or handle new forgings.

ARGUMENT ON THE FACTS.

I. APPELLEE WAS NEITHER A MANUFACTURER NOR PRODUCER, AND WAS NOT SUBJECT TO TAX.

Throughout its statements of facts and points, and also its argument Appellant persists in constantly using the terms "manufacture" and "sale" in describing Appellee's repair process and method of disposal. It carefully avoids mention or definition of the words "repair" and "exchange". In interpreting Section 606(c) of the Revenue Act of 1932 Appellant contends that the process of disposal by Appellee is that of sale and that the process of relining of a connecting rod to fit a crankshaft is one of manufacture or production.

Appellant assumes that when Congress enacted Section 606 it had in mind a use of the words "sold", "manufacturer", and "producer" beyond their ordinary meaning and subject to such enlargement of meaning as the Commissioner of Internal Revenue might choose to adopt for enforced taxation regardless of its own definition in Articles 4 and 41 of Regulations 46, which are quoted in the Appendix hereto.

We do not dispute the fact that a connecting rod is a part for an automobile; it is an integral portion of the automobile engine necessary to the driving force. However, it is not an accessory. Our contention is that there was no manufacture or production and sale of such part by Appellee. To disclose the transactions involved we desire to first present and discuss them from a practical or common sense point of view before replying to Appellant's complex legal involvements and distortions.

To clarify our position let us view the processes described in this case in the light of a more common transaction, one which every individual encounters at somewhat frequent intervals, viz.:

"A" is the owner of a watch which suddenly stops running, just as an automobile stops when its connecting rod bearings burn out. He goes to a jeweler or watch repair shop and asks to have his watch repaired, just as the automobile owner would go to a garage or repair shop to have his car repaired. "A" is told that it will take two or three days to repair the watch and, like the owner of an automobile, he does not like to go without his watch

for such a long period. "A" calls upon the jeweler or repair man to supply him with a watch for use until his own is repaired and, from a stock of watches kept for that purpose, "A" is handed a watch and charged with it. If he returns the watch he is credited with the amount charged. When he receives his own watch he only pays the charge or *price* of the repair. Here we have an exact parallel with the process of the business of repairing connecting rods.

Now, let us follow the watch repair job to its end. After "A" leaves his watch for repair, it may be repaired in the shop or sent to a jobbing watch repair place. In either event what follows is the same. The watch is first dissembled (as is the connecting rod); then its parts are cleaned (as is the connecting rod); then on reassembly the broken or worn part is replaced (as in the connecting rod); then the watch is adjusted so that it will operate and keep correct time (as the connecting rod is polished down to fit); and then the repaired article is ready for delivery to its owner and is delivered when he calls for it and pays the price of the repair job. In the repair it may be necessary to insert a new mainspring, a screw, or a cog to make the watch run, but they are of little cost, like the shim, bolt, or bushing which sometimes is inserted in a repaired connecting rod. The charge is primarily for the work of repair and not for materials. When "A" receives his watch and pays the charge or price of repair he has not bought a watch nor has the jeweler or repairman sold him a watch. The whole transaction

is free from the application of the terms "sold", "sale", "manufactured", "manufacture", "producer", or "produce" as used in Appellants' brief.

An examination of the connecting rods filed as exhibits in Court will show a heavy and strong piece of forged steel, consisting of two parts—a shank and a cap—with the manufacture of which Appellee has nothing to do. The cap is attached to the shank by two bolts and the circle or ring formed by the attachment of the two parts is intended to encircle the crankshaft and transmit the power from the engine to the shaft. The rapid revolutions of the steel shaft within the connecting rod bearing, if it is not cushoined or lined by a softer and more malleable metal, would either cause rattling and result in loss of power if too loose, or freeze the shaft in the bearing, if the jointure was too tight. In either event the power plant of the automobile would be ineffective and perhaps ruined. To overcome this danger the connecting rod must be fitted accurately to the drive shaft by a thin lining of softer metal, so that under heat of high speed revolutions there will be no freezing of the jointure. Wear or heat engendered by too high speed destroys the smoothness of the thin babbitt lining, without injury to engine or shaft, and the resulting rattle immediately warns the driver that his automobile should not be operated further without danger to himself or his car. When this happens "a fitting operation" is required in connection with the reinstallation of that part of the automobile known as the connecting rod,

such as the second paragraph of Art. 41 of Regulations 46 (*vide* appendix) contemplates. The connecting rod which is the part is not "produced" or "manufactured" by Appellee but is refitted by relining, which is only a repair job. It must be remembered that the "babbitt" metal lining in a connecting rod is placed there for the purpose of reducing friction and of overcoming the effects of expansion of the harder metals under heat and is expected, when it is fitted into its place in an automobile to eventually require replacement. This lining to the bearing is of such an actual temporary nature that it cannot well be designated as a taxable part of an automobile. Nor can its replacement or refitting be considered the manufacture or production of anything—it is a minor repair only, not essentially different from the application of a new coat of paint or varnish.

Throughout the record the process of rebabbitting is designated as a repair and it distinctly and undisputedly appears that nothing was done by Appellee to in any way alter, change the form of, or in any way process the forged steel connecting rod. (R. 19, 34, 37, 38, 41, 56.)

At the risk of becoming prolix, we feel that to make adequate reply to Appellant's brief and to point out the errors of interpretation and decision upon which it relies we must indulge in analysis of the terms used in Section 606 of the Revenue Act of 1932 and the parts of Regulations 46 which Appellant considers material.

If the provisions of Section 606(c) are applicable to Appellee's transactions it is imperative that it must be found to have performed two different but conjunctive acts, viz.: (1) it must have *sold* for a *price* automobile parts or accessories and (2) it must have been a *manufacturer* or *producer* of such parts or accessories. Admittedly, Appellee was not an importer.

Just what did Congress intend by use of the words "price", "sold", "manufacturer", "producer"? Those words are not defined in the Act or the Regulations and, therefore, it becomes necessary to examine the statutory language and discover their probable meaning under the well recognized principles of statutory construction.

The first and basic principle of construction is that the terms used must be given their ordinary common-use meaning unless a technical meaning is required by the full context of the provisions. A reasonable interpretation of all the parts of the text should be given rather than one which results in hardship, injustice, absurdity, contradictory provisions, or great confusion.

1 *Paul & Mertens, Law of Federal Income Taxation,* Pars. 3.05, 3.07, 3.08;
Paul & Mertens Cum. Supp., Pars. 3.05, 3.07, 3.08.

Appellant in its attack on the findings places great stress upon the use of the words "sold" and "price" therein as indicating "sale". (Brief 12, 13.) While those words are used in the findings, nevertheless those

findings are definite declarations that Appellee's transactions were those of exchange and not of sale and that the "price" was "the charge for repairing". (R. 17, 18.) Appellant's contentions belittle its argument.

Definition of the word "price" has far broader scope than Appellant gives, viz.:

> "1. Value; estimation; excellence, worth.
>
> 2. In the broadest sense, the quantity of one thing that is exchanged or demanded in barter or sale for another; * * *
>
> 3. Reward, recompense; as the *price* of industry."
>
> *Webster's New International Dictionary.*

So, what appellee received as a "price" for its repair service was the "worth" of or "recompense" for its service and not a sales price for wares and merchandise.

The word "sold" employed in Section 606 is the past particle of the word "sell", to which we must turn for definition, viz.:

> "1. To give; provide. *Obs.*
>
> 2. To transfer (property) for a consideration; to transfer the absolute or general title to (as lands, goods, choses in action) to another party for a price or sum of money; to give up for a valuable consideration; to dispose of in return for something; to convey."
>
> Syn. Sell, barter, vend, trade, bargain.
>
> *Webster's International Dictionary.*

While this definition is susceptible of both a broad and narrow interpretation, it does not include the

term "exchange" nor a charge for work of repair, and the Court below so found. (R. 19.)

We come now to consideration of the terms "manufacturer" and "producer" upon which Appellant lays great stress. These words are not given any specific or confined meaning in Section 606. However, in Article 4 of Treasury Regulations 46, the Treasury Department has performed a mumbo jumbo which passes understanding. Without definition, Article 4 has treated the words "manufacturer" and "producer" as being synonymous to such a degree that it erases all significance of the word "manufacturer" and enlarges the common definition of "producer" far beyond ordinary usage of that word, viz.:

> "Art. 4. *Who is a manufacturer or producer*— As used in this Act, the term 'producer' includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles."

Apparently this Art. 4 misled this Court, when it reversed the District Court in *United States v. Armature Exchange, Inc.,* 116 Fed. (2d) 969, by what we respectfully believe to be gross error.

If Art. 4 is any authority for Appellant's position, it is a palpable distortion and enlargement of the terms it pretends to define, in that it first fails to tell us "who is a manufacturer or producer" as its title indicates and then seeks to enlarge the common definition of "producer". This is an encroachment on the legislative powers of Congress. Congress cannot be said to

have approved the enlargement of the definition as held by this Court in *United States v. Armature Exchange, Inc.,* and contended for by Appellant. Because, where a regulation seeks to create a rule out of harmony with and in enlargement of the statute it is a mere nullity.

> *Manhattan General Equipment Co. v. Commissioner,* 297 U.S. 129, 134, 56 S. Ct. 397, 400; *Koshland v. Helvering,* 298 U.S. 441, 447, 56 S. Ct. 767, 770.

A careful reading of Article 4 of Regulations 46 shows that it attempts a definition which defines a term in the terms to be defined and thus becomes no definition at all and is but a hodge-podge which seeks to enlarge the meaning of its undefined words. If any ambiguity exists in the statutory language Article 4 has done nothing toward clarification, and we must turn directly to the language of the statute and the common definitions of the non-technical words it contains to clarify its application to the facts of this case.

The ordinary meaning of the words "manufacturer" and "producer" is clear. A manufacturer is one who makes something new. To manufacture is:

> "1. To make (wares or other products) by machinery, or by other agency; as to manufacture cloth, nails, glass, etc., to produce by labor, esp., now, according to an organized plan and with division of labor, and usually with machinery."
>
> 2. To work, as raw or partly wrought materials, into suitable forms for use, as to manufacture wool, iron, etc.

3. To fabricate; to invent; also, to produce mechanically;—chiefly disparaging."

Webster's New International Dictionary.

Similarly, to produce is: *"To give being or form to; to manufacture; make; as he produces excellent pottery"*, and a producer is "one who produces, brings forth or generates."

Webster's New International Dictionary.

The definitions above set forth contemplate something that Appellee never did or accomplished. They contemplate the creation of something new and different, not a mere restoration for fulfillment of its prior purpose and use of a preexisting article which had been in actual use and which had temporarily lost its useful purpose by wear.

The terms manufacture and produce must be compared with the word "repair", a word which is repugnant to and exclusive of manufacture or produce. To repair is *to restore to a sound or good state after decay, injury, dilapidation, or partial destruction; as to repair a house, a road, a shoe, also to renew, revive or rebuild.*

Webster's New International Dictionary.

Thus while *"manufacture"* or *"produce"* contemplates the initial making of an article, *"repair"* contemplates the restoration of a previously made, previously used, article to something approaching its original utility.

Congress fairly cannot be said to have approved the enlarged construction of the statute now contended by

Appellant, particularly as that enlarged construction is predicated upon the reading into the Regulations something which does not exist.

It would have been so simple for Congress to have said: "the repair or reconditioning of automobile parts shall be considered the manufacture or production of such parts." Congress did not do so. The Treasury Department did not attempt to do so in its Regulations. In the face of the simplicity and brevity with which the words could have been added, the silence of both statute and regulations is most significant.

Congress could have merely added the word "reconditioner" to manufacturer, producer, or importer. It did not do so. Failure to do these things exempts Appellee from the tax Appellant seeks to create by Court decree and collect.

In this case we have the development of a repair service which merely takes the already taxed article and repairs it with a new lining so that it will again smoothly fit the driving shafts. The development has come from the public demand upon automobile repair shops for more speedy repair and return delivery of automobiles. The ordinary repair shop is not equipped for quickly rebabbitting a connecting rod. If the work was performed in such a shop by the ordinary mechanic it would greatly delay the repair of the automobile and increase the labor cost of such repair. But if the repair shop should itself rebabbitt the bearing, it could not be called a manufacturer any more than it may be called a manufacturer for reboring cylinders

and furnishing the piston with new rings. Its whole job would be called one of repair and the parts supplied to the job would, if taxable, bear the tax paid by the manufacturer thereof. The fact that the connecting rod had been taxed as a part of the automobile when sold as a whole would free it from any tax if it were repaired. If, instead of a bearing being burned out, the connecting rod had become bent, would the repair job become a producer's job because a mechanic had put it into a press to process it and remove the bend? We think not, and yet under the contended enlarged definition in Article 4 the Appellee must so contend under his arguments.

Appellee is but the *alter ego* of the repair shop, or more properly, of a large number of repair shops. By having men trained to perform but one specific task, by having the necessary special equipment, by performing quantity service—Appellee can perform the work of repair or refitting the bearing cheaper and better than can the average general mechanic in the average automobile repair shop. By establishing a deposit bank, either on its own shelves or on jobber's shelves, to which the automobile repair man can go and immediately receive a repaired rod in exchange for a burned-out rod without any charge other than for the work of repair, Appellee becomes locked into the chain of automobile repair which in no way falls within the definitions found in Section 606 of the 1932 Act or Article 4 of Regulations 46.

In its quotation of a part of Section 606 of the Revenue Act of 1932 in the Appendix to its brief,

Appellant carefully omits the quotation of subsections (a) and (b) and states parenthetically "Subsections (a) and (b) refer to automobiles, automobile trucks and motorcycles". Thus it ignores the fact that every connecting rod which comes from the manufacturer of an automobile comes out tax paid. By subsection (b) a tax of three percentum of the sales price is imposed on every manufacturer of automobiles and in each of those automobiles are from four to twelve connecting rods, which if sold independently by the manufacturer of the rods would be subject to a tax of only two percentum under subsection (c). Thus every rod which came to Appellee under the facts shown by the record was tax paid when it came into its hands (R. 62) and no part of Section 606 contemplates a retax for repair work or any double taxation on any part on which tax had once been paid whether as a single article or as an assembled part of an automobile. It does not matter whether the rod comes from an automobile that is being repaired or from one that has passed the stage of repair, tax on that rod had been paid by the manufacturer of the automobile to which it originally belonged at the time of its sale.

Perhaps cognizant of the lack of real merit in its claim for tax under section 606(c) of the Revenue Act of 1932, Appellant seems to seek to have the tax sustained (Brief 16) under another section of the Act which was not invoked in collecting the tax sought to be refunded nor in defending the collection in the action tried in the District Court. Section 623 of the 1932 Act provided:

> "Sec. 623: SALES BY OTHERS THAN MANUFACTURER, PRODUCER, OR IMPORTER. In case any person *acquires from the manufacturer, producer, or importer* of an article, by operation of law or as a result of any transaction not taxable under this title, the right to sell such article, the sale of such article by such person shall be taxable under this title as if made by the manufacturer, producer, or importer, and such person shall be liable for the tax." (Italics supplied.)

It is difficult to see the application of this Section to the case at bar. The evidence shows that none of the connecting rods repaired by Appellee were acquired by him from the manufacturer, producer, or importer thereof. Such being the case Section 623 could not apply to Appellee. Nor can it be said, by any stretch of the imagination, that the evidence can in any way support the contention that Appellee acquired the connecting rods which it repaired "by operation of law or as a result of any transaction not taxable under this title", because the manufacturer's tax had been paid on all such rods when they passed into Appellee's hands for repairs. (R. 62.)

We have a further confession of weakness on the part of Appellant when, to defend its interpretation of Article 4 of Regulations 46 and to sustain the force of its argument, it cites Section 1111(b) of the Revenue Act of 1932. (Brief 18.) We have heretofore commented on the ambiguities and inclusions of Article 4 which render it meaningless and a nullity. However, Appellant, seeks to resuscitate the meaningless provision by the powers it claims to exist in

Section 1111(b) of the 1932 Act. It claims that Section 1111(b) legalizes the inclusions in Article 4. Section 1111 relates to definitions used in the Act, none of which include the definitions applicable in this case, and heretofore discussed. Subsection (b) on which Appellant leans for support provides:

> "(b) the terms 'includes' and 'including' *when used in a definition contained in this Act* shall not be deemed to exclude other things otherwise within the meaning of the terms defined." (Italics supplied.)

But "the terms 'includes' and 'including' " are not used in any definition in Section 606 of the Act. The word "includes" is found in Article 4 of Regulations 46, which is not a part of the Act. Appellant's appeal for succor under Section 1111(b) is therefore a futile effort because it asks this Court "to graft something on the statute which is not there".

See

Smietanka v. First Trust & Sav. Bk., 257 U. S. 602, 606.

In its final argument under Point I of its brief (pp. 20-22), Appellant pleads to be freed from the fetters of "technical refinements" of definitions. This seems a strange plea; because it is Appellant who seeks technical refinements and legal fictions to support its cause while Appellee seeks to cast aside the screen of legal fictions created by Appellant and to have the statute interpreted on the basis of the ordinary and common meaning of the words employed therein or

applicable to the transactions which Appellant seeks to tax.

To support its plea Appellant cites several cases which, on reading, appear to be entirely inapplicable to the facts and law applicable to the present case. It quotes from *Raybestos-Manhattan Co. v. United States,* 296 U. S. 60, 63 (Brief 20) and seeks to make the quotation applicable by omission of the statements and explanations which preceded and followed the quotation. The issue before the court in that case to which the quotation referred was liability for a stamp tax on transfers of property and shares or certificates of stock. There the taxpayer sought a highly technical and limited interpretation of the word "transfer"; here it is the government seeking a technical interpretation. Appellant then cites *Founder's General Co. v. Hoey,* 300 U. S. 268, another stamp tax case on stock transfers, which, as we read it, contains no word of support for Appellant's plea for an enlargement of such terms as "sale", "price", "manufacturer", or "producer".

Appellant also quotes from *Tyler v. United States,* 281 U. S. 497, 503; an estate tax case which involved the inclusion of an estate in entirety in the taxable gross estate under an express statutory provision therefor. Appellant's quotation (Brief 20) seems to be inapplicable to this case, but, if "the power of taxation" is "not to be restricted by mere legal fictions", it is equally true that "the power of taxation" is not to be *enlarged* "by mere legal fictions" such as Appellant seeks to use.

Appellant cites *Turner v. Quincy Market Cold Storage & Warehouse Co.,* 225 Fed. 41, 43 (Brief 21) to claim for "broad" interpretation of the word "manufacture". That case involved a patent on a method of building construction and it held that construction under that process was one of manufacture. That case and *Hughes & Co. v. City of Lexington,* 211 Ky. 596, also cited by Appellant (Brief 21) have no application to interpretation of taxing statutes nor any relation to the application of the words used in Section 606 of the Revenue Act of 1932 which we have heretofore discussed.

The case of *Carbon Steel Co. v. Lewellyn,* 251 U. S. 501, 505 from which Appellant quotes (Brief 22) involved the interpretation of the word "manufacturing" as employed in "the munition manufactures tax" provisions of the Act of September 8, 1916, Sec. 301. (Comp. Stats. Sec. 6336¼b.) There the taxpayer sought to avoid the tax because it sublet the most of the work of production of explosive shells to independent contractors. The quotation of Appellant was aimed at this contention. But before making the quoted statement the Court explained (p. 504), regarding the Carbon Steel Co. as follows:

> "It was the contractor for delivery of shells, made the profits on them and the profits necessarily reimbursed all expenditures on account of the shells. It was such profits that the act was intended to reach—profits made out of the war and intended to defray the expenses of the war. * * * Petitioner, it is true, used the services of others but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge."

Even this language does not call the taxpayer in the above case a "manufacturer" or "producer" it merely holds that, under the peculiar contract held by it, it was engaged in "manufacturing" under a statute widely differing from Section 606 of the 1932 Act.

We have no quarrel over the quotation from *Stone v. White,* 301 U. S. 532, 537 (Appellant's Brief 22), but if that quotation applies to Appellant's argument, its converse applies more forcibly to Appellee's position, viz.:

> "It is in the public interest that no one should be subjected to a tax burden except by positive command of law, which is lacking here."

What the Appellant contends and what Appellee asserts to be the answer to that contention may be stated in the language of the Supreme Court, viz:

> "What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted * * * may be included within its scope. To supply omissions transcends the judicial functions."
>
> *Iselin v. United States,* 270 U. S. 245, 251; 46 S. Ct. 248, 250.

The rule for statutory construction sought by Appellant and for which it argues violates all accepted rules. A statute must be taken as it stands without judicial addition or subtraction; the absence of specific provision in a statute is persuasive evidence that there is no intention to provide.

> *Caminetti v. U. S.,* 242 U. S. 470, 37 S. Ct. 192, 196;
>
> *Central Real Estate Co. v. Commissioner,* 47 Fed. (2d) 1036, 1037.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS OF THE DISTRICT COURT AND THIS COURT IS WITHOUT POWER TO ALTER THOSE FINDINGS.

The District Court made full and complete findings of fact in the instant proceeding and as a result of those findings concluded and determined that Appellee was not subject to the tax imposed by Section 606 of the Revenue Act of 1932. Among those findings were the following:

> (1) Appellee was not a manufacturer or producer; appellee merely repaired worn connecting rods.
>
> (2) Appellee did not sell connecting rods; it merely exchanged rods, charging only for the repair operation.

These findings are not conclusions of law; they are findings of simple facts in simple terms. When the District Court found that Appellee was a repairer, it was acting in a fact-finding capacity. The same is true of its other findings. The terms used in the findings are simple terms conveying universally recognized meanings rather than technical, legalistic meanings of peculiar or special import.

It is well established that a Circuit Court of Appeals has no power to weigh the evidence and determine the facts. The scope of its inquiry is to determine whether any substantial evidence supports the findings of fact as found by the lower court.

> *McCaughn v. Real Estate Land Title & Trust Co., et al.,* 237 U. S. 606, 56 S. Ct. 604, 605 (1936);
>
> *Deputy v. DuPont,* 308 U. S. 488, 60 S. Ct. 363, 368.

Appellant concedes that whether or not a given operation is a manufacture is a question of fact, dependent upon all the facts and circumstances which must be taken into consideration, citing and quoting from *City of Louisville v. Zinmeister & Sons,* 188 Ky. 570, 222 S. W. 958. (Brief 34, 35.) It also stresses the language in the same case that the size of plant, nature of the business, number of employees or the article involved are not conclusive of the question.

Inconsistently it then urges that any organized repair of automobile parts is the manufacture of such parts and states that all cases to the contrary have been overruled! The only one of such cases which has actually been reversed by a Circuit Court is the case of *United States v. Armature Exchange, Inc., supra.* In that case the question of the finality of the lower Court's findings was not presented to this Court.

This Court has frequently ruled that it will not disturb the lower Court's or Board of Tax Appeals determination of facts, even ultimate facts, unless the evidence clearly discloses an absence of support for the findings.

Winnett v. Helvering, 68 F(2d) 614;

Tricon v. Helvering, 68 F(2d) 280, Cert. denied 292 U. S. 655;

Week v. Helvering, 68 F(2d) 693, Cert. denied;

Cf. *American Chain Co. v. Eaton,* 291 U. S. 386, 54 S. Ct. 443 (1934);

Eaton v. Commissioner, 81 F(2d) 332;

Perry & Co. Inc. v. Commissioner (C.C.A.-9, May 23, 1941), 1941 Prentice-Hall #62,708.

III. THE DECISIONS UPON WHICH APPELLANT RELIES DO NOT WARRANT REVERSAL OF THE DECISION OF THE DISTRICT COURT NOW BEFORE THIS COURT.

The two decisions upon which Appellant places the greatest reliance to support its appeal in this case are *United States v. Armature Exchange, Inc.* (C.C.A. 9), 116 Fed. (2d) 969, and *Clawson & Bals, Inc. v. Harrison* (C.C.A. 7), 108 Fed. (2d) 991, because those cases are the only decisions on appeal from the District Courts which touch upon the statute involved herein.

It is admitted that these two decisions are apparently adverse to Appellee. However, they do not form precedents for this case and with all due respect to the two Circuit Courts of Appeal, we assert that they are unsound and erroneous and should be overruled. This assertion is made by counsel as an officer of the Court in endeavor to correct its errors and, also, as counsel to protect the client from a continuation of error.

Because *United States v. Armature Exchange, Inc., supra,* is the decision of this Court and the one which Appellant first cites, we make it the primary subject of analysis. If our comment seems harsh, we ask the Court to attribute it to zeal rather than to contumely. There are certain elements which distinguish the present case from that of the *Armature Exchange, Inc.* and these are indicated by statements in the opinion in that case, viz.:

> "It is not denied that the taxpayer sold the armatures in question, nor is it denied that the armatures constitute automobile parts or accessories. The sole question involved in this appeal

is whether or not the sales are taxable to taxpayer as the manufacturer or producer thereof."

The opinion states some further distinctions which we will not here enumerate. We believe these distinctions to be adequate to remove the *Armature Exchange, Inc.* case as a precedent for this case. Yet the interpretation of "manufacturer or producer" in that case is in our minds so erroneous that we must point out its error.

First we must ask the Court to bear in mind that in this case we make primary contentions as follows:

1. The taxpayer did not sell connecting rods but repaired and exchanged them, and the Court so found.
2. It is admitted that connecting rods are automobile parts.
3. Taxpayer did not "manufacture or produce" connecting rods, it repaired them, and the Court so found.
4. Taxpayer's price was a charge for repair and not the price of a connecting rod sold as an article of merchandise.

At the commencement of its opinion on the alleged merits of the government's contentions in the *Armature Exchange, Inc.* case this Court "distinguishes" certain authorities cited by that taxpayer in its brief. Such "distinguishment" appears to be more of a rejection of the authorities. To us it appears that they are of some material aid in determining the statutory

use of the words "manufacture" or "manufacturer" when no definition of such words appears in the statute itself. On the Court's rejection of those cases as precedents we will make no further comment.

The opinion is marked by its failure to discuss the relationship of the word "repair" to the words "manufacture or produce"; also, by its failure to define any of the applicable words. Apparently the opinion is restricted in its applicability to the facts of the particular case as this Court viewed them.

Following the comments on the decisions cited by the taxpayer in its brief in the *Armature Exchange, Inc.* case, the opinion of this Court considers six items very briefly to reach its decision to reverse the lower court and on these we will comment in the order in which they are stated in the opinion, viz.:

1. The opinion states that it cannot accept the taxpayer's qualification of the words "manufactured or produced" to the limited meaning that articles must be "manufactured or produced" entirely from new or virgin raw materials. We agree with the Court on this statement because today hardly any product of steel, aluminum, bronze or brass is manufactured without the addition of scrap materials to the virgin material. However, the words "manufacture or produce" have widely different meanings than the one upon which this Court centered its attention; the most common of which is to "make" or "produce" something new, without consideration of whether the materials were raw or old.

2. The opinion next states that it recognizes the rule of literal construction but that it refuses to recognize it in that case. Perhaps this was because the Court centered its opinion on the fact that the trial court's conclusion was "that the rebuilt armatures were not 'manufactured or produced' by the taxpayer is premised upon the assumption that there must be a 'new and different article' at the completion of the taxpayer's operation". This rejection of the application of a rule to the words "manufacture or produce" seems to be entirely unwarranted, because the facts of the case show that the work performed was that of "repair" or "restoration". The true significance and limitation of "manufacture" or "produce" cannot be understood unless other related terms, such as "repair" and "recondition", are considered. The ordinary meaning of what constitutes "manufacture" must be something different from "repair", unless the words are synonymous, which they are not. They are mutually exclusive. The same contrast must be made between the terms "produce" and "recondition", and then a cross contrast must be made. When such contrasts are made the words emerge with simple ordinary meanings which may not be considered "literal" or "technical". The opinion failed to take into consideration any definition of "manufacturer or producer" and by a process of exclusion refused to recognize such words as "repair" or "recondition" as indicating that the process of the *Armature Exchange, Inc.* fell without the meaning of the words "manufacture" or "produce".

3. To sustain its conclusion that the decision of the District Court in the *Armature Exchange, Inc.* should be reversed because it was based upon a "literal" construction or assumption of the meaning of the words "manufacturer or producer", the opinion quotes from the decision in *Carbon Steel Co. v. Lewellyn,* 251 U. S. 501, 505, as follows:

> "* * * it (the rule of literal construction) cannot be carried to reduce the statute to empty declarations * * *"

This quotation was without any applicability to the facts in *Armature Exchange, Inc.*

A reading of the entire cited case shows that the rule is declared only under and applicable to the peculiar facts present in that case. There the taxpayer was the *original* contractor for manufacture of *new* explosive shells from raw materials and was partial manufacturer, with subcontractors to complete the process of manufacture of the shells, and sought to escape the munitions manufacturers' tax upon the ground that because it did not perform all the work of processing it was not a "manufacturer". The court in laying down the above-quoted principle, held that because the taxpayer held the contract, made the profits thereunder, performed the process of manufacturing the raw steel in bar form and sublet the completing processes it was a manufacturer under the particular contract and the particular statute involved. Thus it appears that if the above quotation states a rule it is only the rule of that particular case.

In citing the above quotation the opinion of this Court ignores the fact that tax had already been paid on the armatures, either by the manufacturer thereof or by the manufacturer of the automobiles of which they formed a part. An insistence on an ordinary or a literal meaning of the words used does not reduce the statute "to empty declarations" if the effect is to prevent double taxation. For the Court to interpret words beyond their ordinary meaning in order to enforce a tax is judicial legislation, which is beyond the power of the courts.

4. The opinion next refers to and accepts certain of the government's contentions as follows:

> "The Government contends, and we think properly, that the *discarded* armatures purchased by the taxpayer, *having lost* their *function as a useful article* as well as their *commercial value* as such, *when acquired for use in the manufacturing and production of an article of commerce,* bear the same relation to the completed armature as the purchase of unused materials would bear to the completed article." (Italics supplied.)

We consider the government's contentions exaggerated beyond reason, as they are in most cases where it attempts the extension of taxing statutes, and the adoption of its contentions extends the facts beyond the record in the case. We have italicized certain portions of the above quotation. The armatures were not "discarded" if they were turned over to the taxpayer for repair or if they were saleable to it for repair or reconstruction. They had not "lost" their "function

as a useful article'' nor their ''commercial value'' if they could be and were restored to use. If all the armatures were acquired by the taxpayer for repair and reconditioning it does not follow that they were ''for use in the manufacturing and production of an article of commerce'' in the sense that manufacture and produce are used in Section 606. To adopt the contention of the government as above quoted as meeting the requirements of the statute is to indulge in assumption far beyond the fact of the case. As long as the intention exists to restore to sound condition a worn or damaged article it does not become ''scrap'' or ''junk'' and is not ''discarded''.

We fail to see the applicability of *Cadwallader v. Jessup & Moore Paper Co.,* 149 U. S. 350, cited in the opinion, to the contentions adopted by this Court. There old rubber shoes were imported for the purpose of totally destroying their useful purpose as shoes and were not intended for repair or reconditioning. The shoes were described as ''old scrap or refuse India rubber.'' The terms ''scrap'' or ''refuse'' properly can not be applied to the armature cores which were intended for use and put to use as armatures.

5. The opinion proceeds to quote from Article 4 of Regulations 46 to prove the merit of its conclusions that the taxpayer was a ''manufacturer or producer''. It is our contention that this quotation and the interpretation thereof conclusively proves the error of the reasoning in the opinion and the conclusions based thereon. The material part of Article 4 must not be

constricted as it is quoted in the opinion. The full wording is as follows:

> "Art. 4. *Who is a manufacturer or producer?* As used in the Act, the term 'producer' *includes a person who produces* a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles." (Italics supplied.)

This full quotation discloses the defects in the emasculated quotation found in the opinion. Note that the title of the Article indicates an intention to define both "manufacturer" and "producer", but the text does not mention "manufacturer" nor define the word "producer". What is there in the quoted paragraph to confirm any conclusion reached by the Court? Nothing. We have a definition (?) which does not define but upon which the Government places great stress in its contentions with which the Court agrees. Can a purported definition which defines nothing be accepted as a controlling definition? To say "yes" would be to assert an absurdity. Added to this non-defining definition is the statement that the term "producer" (not "manufacturer") "includes a person *who produces a taxable article* by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles". How can the Treasury Department (if it had the power, which it has not) extend the meaning of a definition which does not exist in the Statute or the regulation? We confess we cannot answer the question.

The opinion next attempts to fix the application of the meaningless Article as an administrative rule which has gained the approval of Congress because it appeared in the same form under other regulations for prior Revenue Acts and cites *Helvering v. Reynolds Tobacco Co.* (1938), 306 U. S. 110, 115, to justify its position. The cited case is not applicable for two reasons: (a) it does not countenance the extension and enlargement of statutory language by ambiguous and unintelligible administrative rules; and (b) the later case of *Helvering v. Reynolds* (1941), 61 S. Ct. 971, held that the case cited above "turned on its own special facts", something in the nature of an estoppel against the government. Moreover, the interpretation given to Article 4 by this Court in accepting the doubtful but contended enlargement of the ordinary definition of "producer" and excluding the proper definitions of "manufacturer" is a recognition of an illegal attempt to assume power on the part of the Treasury Department. That Department has not the power to make law, but only "the power to adopt regulations to carry into effect the will of Congress *as expressed by the statute*".

> *Manhattan General Equipment Co. v. Commissioner,* 297 U. S. 129, 134, 56 S. Ct. 397, 400;
> *Koshland v. Helvering,* 298 U. S. 441, 447, 56 S. Ct. 767, 770.

In a more recent case than those above cited the issue involved the validity of regulations requiring the income received in the interim between the death of a decedent and the optional valuation date to be

considered in the valuation of the gross estate, when such optional date was used. In reversing the Circuit Court of Appeals for the Second Circuit, the Supreme Court held the regulation (Regulation 80, Art. 11) to be a void extension of the statute, just as we consider Article 4 involved in the case under discussion to be meaningless and void. The Court considered that if Congress had intended the result urged by the Government, it would unequivocally have so declared. It could have done so simply and its silence indicated a contrary intention.

Maas, Exr. v. Higgins (March, 1941), 61 S. Ct. 631, 634.

In the *Armature Exchange, Inc.* case, as well as in the present case, we assert the Government's contentions to be beyond the meaning of the statute. Had Congress intended to tax repair work or enlarge the common meaning of the terms employed in the statute it would have been a simple matter so to state.

6. The opinion in the *Armature Exchange, Inc.* case ends with a somewhat speculative conclusion depending upon "ifs" and a further complete disregard of the work done. As the taxpayer did not use "new cores" the court may not speculate on what it would have done with them. As the old cores were not "discarded" and "out of circulation" but were in use for purposes of repair, the final conclusion of the court seems to be based on a misjudgment of the facts.

The second case upon which Appellant relies most strongly is that of *Clawson & Bals, Inc. v. Harrison,*

108 Fed. (2d) 991. That case is distinguishable from the present case and of dubious soundness. Because that case involves "connecting rods", as does the present case, it will be necessary to more closely analyse the facts, particularly so as the facts were found by the District Court in the first case to hold the repair process to be one of manufacture and are strongly adverse to the taxpayer for that reason.

In the first place *Clawson & Bals, Inc.* held itself to be a manufacturer and dealer in automobile parts and accessories and actually prepared new connecting rods from forgings, as well as altering used rods, which were admittedly sold to the trade. Appellee in this case *"Moroloy Bearing Service of Oakland, Ltd."* was what its name indicated. It did not process new forgings or alter old rods. It only serviced or repaired used rods for automobile repair shops and jobbers engaged in supplying repair shops by a system of exchange. (R. 42.)

The status of *Clawson & Bals, Inc.* may well be shown by quoting from the findings of the trial court:

> "Plaintiff kept but one stock with respect to each member and *had but one outright price* with respect to the rods, *irrespective of whether they were produced from entirely new castings or from scrap,* and regarded the articles *made* from scrap as equivalent to any similar products made entirely from virgin metal. The *rods made from scrap* were in competition with similar products made entirely of virgin metal and were just as serviceable. *They were held out for sale and sold*

> *on the same basis and under the same warranties* as the connecting rods produced entirely from virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guaranty or otherwise." (Italics supplied.)

We have italicized those findings which do not apply to Appellee in this case. Let us examine the differences.

Appellee had no price for connecting rods, it merely charged for the service of relining the rods with babbitt metal. (R. 71.) It did not produce or make rods from virgin metal or scrap. (R. 41.) It did sell rods. It did not warrant the rods, its warranty ran only to the rebabbitted repair work. (R. 57, 58.)

We believe that because of the use of the word "scrap" by the District Court and the confusion arising therefrom, the Circuit Court of Appeals for the Seventh Circuit was misled in its conception of the case and Appellant in this case is seeking to create confusion and to exaggerate the employment of used rods for repair by laying great stress upon the words "scrap" and "junk". (Brief 33, 34.) Therefore we will attempt to dispose of those terms before proceeding further with discussion of the *Clawson & Bals, Inc.,* decision.

The record in the present case shows that more than ninety-five per cent of the used rods which were purchased came from concerns who made a business of

collecting serviceable used connecting rods and selling them to rebabbitters for repair and exchange. (R. 45-46.) However, the approximately 4000 rods which were so purchased represented but a small proportion of the approximately 60,000 rods repaired by Appellee each year. (R. 70.) The great majority of the rods which Appellee repaired came from the automobiles in which they were actually used. (R. 59.) This factor is entirely disregarded by Appellant herein. As long as the rods which were purchased by Appellee were useful articles which were salvaged by wreckers because they had further usefulness for the identical original purpose for which they were manufactured and were sold to dealers for resale to rebabbitters for the same original useful purpose they do not come within the definitions of the words "scrap" and "junk" recited by Appellant. (Brief 33-34.) They were never "thrown aside", they were always as useful to the owner as they were in the hands of the original forgers, they were not "worn out or discarded material". As "scrap" or "junk" they would only be useful to melt down for the fabrication of some new article. Appellee did not have any equipment for the forging of connecting rods from "scrap" or virgin metal. (R. 41.) Furthermore, and a fact not considered by the Court in the *Clawson & Bals, Inc.* case and wholly ignored by Appellant in the present case, the used connecting rods, whether "scrap", "junk" or merely used rods, were all tax paid under Section 606 of the 1932 Act or the prior Acts imposing an excise tax on the manufacturers of

automobiles or automobile accessories or parts. (R. 62.)

To resume further consideration of the decision in *Clawson & Bals, Inc.* case we call attention to the adoption of a statement by the District Court (39-1 U. S. T. C. No. 9219) as part of the written opinion of the Circuit Court of Appeals. That adopted statement was "oral", apparently made at the conclusion of the trial without consideration of statutes, regulations, or decisions of United States courts. Without review or application of the statute, the District Court Judge apparently saw nothing but a similarity between a used but useful forged-steel connecting rod and a "worn-out tire case", and on that basis he decided that the plaintiff carried on a "manufacturing process" and therefore was a "manufacturer and producer". The Circuit Court of Appeals, in accepting the original opinion and findings of fact and conclusions of law likewise ignored all reference to the applicable statute in sustaining the District Court, although at the time of its decision (December 13, 1939) and of the decision of the District Court (November 26, 1938) five District Courts of other circuits had held to a contrary conclusion, as follows:

June 28, 1934, *Skinner Tire & Rubber Co. v. U. S.* (S. D., Ohio);

October 5, 1936, *Monteith Bros. Co. v. U. S.* (N. D., Indiana);

May 6, 1937, *Hempy-Cooper Mfg. Co. v. U. S.* (W. D., Missouri);

May 18, 1938, *Bardet, et al. v. U. S.* (N. D. of California);

August 17, 1939, *Con-Rod Exchange, Inc. v. U. S.* (W. D., Washington).

Why did both the District Court and the Circuit Court of Appeals in the *Clawson & Bals, Inc.* case wholly ignore these decisions and show no reason for diverging in conclusions? As the course pursued was so unusual we cannot even venture to answer our own question, because even if the District Courts were inferior, the decisions of five different judges thereof demanded consideration.

However, this fact stands marked that, without reference to five decisions of the United States Courts or the statutes which those decisions interpreted and with reference only to one Canadian decision and that without disclosing or comparing the Dominion statutes or regulations with those of the United States, the court decided that repair of connecting rods was manufacture or production. No party ever leaned upon a weaker support than does Appellant in relying upon the *Clawson & Bals, Inc.* case.

Furthermore, when the present case was submitted to Judge Welsh in the District Court, Appellant relied upon *Clawson & Bals, Inc.,* appellate court opinion and other cases cited in its present brief and made substantially the same arguments as are found in its brief on this appeal. After careful consideration of Appellant's arguments, Judge Welsh was not impressed by the soundness or application of the *Clawson*

& Bals, Inc. decision, and rendered the decision here on appeal.

Finally the *Clawson & Bals, Inc.* decision attempts a distinguishment of the word "repairer", supposedly in distinction from the words "manufacturer or producer", although it does not place the words in juxtaposition. The word "repairer" does not exist in Webster's New International Dictionary, but we may assume that it means "one who repairs". The language of the "distinguishing" paragraph is both ambiguous and fallacious. It assumes that a "repair" cannot be made by a person to articles owned by him and intended to be an article of trade without such person becoming something other than a "repairer", but it does not say he becomes a "manufacturer or producer". We have heretofore in Part V of this brief commented on the meaning of "repair" and neither in the definition quoted there or in any other definitions were we able to find that the word "repair" means anything more than "to restore to a sound or good state after decay, injury, dilapidation, or partial destruction", and that meaning is not confined to or limited by the ownership or future disposition of the article repaired.

Further in the "distinguishment" the opinion states: "Neither taxpayer nor the trade recognizes that the finished connecting rods are repaired rods". We cannot see that this conclusion is true in its application to the facts in *Clawson & Bals, Inc.* but it is absolutely false in any application to the present case.

In this case the record distinctly shows that Appellee held itself to be nothing more than a repairer or rebabbitter of connecting rods and disclosed on all its exchanges that the rods were repaired or rebabbitted. (R. 34, 35, 60.)

In order that this Court may not consider that we are unduly harsh in our comments on the decision in the *Clawson & Bals, Inc.* case we would call attention to the opinion of the District Court (S. D., California) in *J. Leslie Morris Co. Inc. v. U. S.,* 40-2 U. S. T. C. No. 9608, where a case similar to the present one was before that court. There the decision of the Circuit Court of Appeals for the 7th Circuit was discussed and held to be worthless as a precedent. The same conclusion was reached by the District Court (W. D. of Washington) in *Con-Rod Exchange Inc. v. U. S.,* 28 Fed. Supp. 924, decided August 17, 1939.

Furthermore, reverting to the likeness between retreading "worn-out tire cases" and "used connecting rods" upon which the Court of the 7th Circuit placed so much stress in making its decision we would call attention to the fact that in accepting such likeness as a reason for its decision it entirely ignored the decision of District Court (S. D., Ohio) in *Skinner Tire & Rubber Co. v. U. S.,* 8 Fed. Supp. 999, decided June 28, 1934, which held that the plaintiff in that case which was engaged in the business of retreading tires, was not a "manufacturer or producer" but a "repairman" and not taxable.

The government asserts that all of the decisions of the District Courts which we have cited have been overruled by the decisions of *Armature Exchange,*

Inc. and *Clawson & Bals, Inc.* which we have discussed at length above. With this we cannot agree, because (1) we do not believe that those two cases are directly applicable to the District Court cases which the government failed to appeal; (2) those two cases, if they create any rule, are limited in application to the facts and conditions of the particular cases to which they apply; and (3) the two decisions are based on illogical and untenable premises and should be overruled as improper interpretations of Section 606 and the intent of Congress therein.

IV. THE GOVERNMENT'S POSITION IS NOT SUPPORTED BY TREASURY REGULATIONS AND HAS NEVER RECEIVED CONGRESSIONAL APPROVAL.

As is pointed out by Appellant the first tax on the manufacture and sale of automobile parts as such was under the Revenue Act of 1918, Section 900(3). The taxing language was almost identical to that of Section 606 of the Revenue Act of 1932, and was carried forward by express reenactments in the Revenue Acts of 1921 and 1924. It was eliminated in the Revenue Act of 1926.

During the entire period from the passage of the Revenue Act of 1918 until the passage of the Revenue Act of 1926, some eight years, no Treasury ruling, informal or otherwise, existed under which the rebabbitting of connecting rods, the retreading of tires, the rewinding of armatures, etc., was held or considered to be a manufacture.

During this same period, as Appellee urges, Article 7 of Treasury Regulations 46 as revised in Decem-

ber, 1920, was in virtually the same language as Art. 4 of Regulations 46, 1932 Edition. (Br. 38, 39.) The Government consistently interpreted the statute and its own regulations as excluding such things as retreaded tires and "rebuilt" or repaired connecting rods, batteries, generators, armatures, etc. Prior to 1936 no case held that any of these things were subject to tax.

Congress, in repeatedly reenacting the statute in essentially the same language as in the Revenue Act of 1918 gave its approval, not to the government's present contentions, but to the historical and existing interpretation of its prior enactments. If Congress desired the organized mass repair of automobile parts and accessories to be taxed as a manufacture, it could and would have so stated under these circumstances.

The first cases under the government's attempted enlargement of Section 606 of the Revenue Act of 1932 were decided against the government and in favor of the taxpayer.

Skinner v. U. S., 8 F. Supp. 999 4 U. S. T. C. 4311, 4313, 4314 (W. D. Ohio, June 28, 1934) (Retreaded tires not taxable where identity not lost);

Monteith Brothers & Co. v. U. S., (N. D. Ind. 1936, 1936 Prentice-Hall, Vol. 1, par 1710) (Connecting rods and armatures);

Hempy-Cooper Mfg. Co. v. U. S. (W. D. Mo., 1937, 1937 Prentice-Hall, Vol. 1, par. 1461) (Connecting rods);

Bardet v. U. S. (N. D. Cal., May 18, 1938, 1938 Prentice-Hall, Vol. 1, par. 5507) (Connecting rods).

The government acceded to the interpretation given by the Court in the *Skinner case, supra.*

S. T. 812, XIV-1 C. B. 406 (1935).

In this ruling it was held that where the process does not destroy the identity of the used article processed, the process is not one of manufacture or production, but of repair.

Now, what did Congress really do? It reenacted as Section 606 of the Revenue Act of 1932 prior statutes under which the Government had consistently regarded and treated restoration processes as repairs rather than manufactures. It could have included repair processes as subject to tax but did not. It approved the administrative interpretation which had been placed upon the statutory language.

After the passage of the 1932 Act, administrative attempts were made to enlarge the statute; no formal or specific regulation was passed, but attempts were made to collect taxes where exemption had long existed. These attempts were uniformly unsuccessful while three additional statutory reenactments were made by Congress.

After the decision in *Clawson & Bals, Inc. v. U. S., supra,* which has been extensively criticised in more recent decisions, an entirely new and different interpretation of the statute, a gross enlargement of its terms, was indulged in by the Government, still informally.

S. T. 896, 1940-1 C. B. 252 (1940).

The regulations were amended, still in a most ambiguous manner, to include the words "salvage", "scrap", "junk".

Section 316.4, Regs. 46, 1940 Edition.

Thus the real history and significance of the Congressional reenactments disclose that Congress has repeatedly approved an administrative and judicial construction which is the exact opposite of that asserted by Appellant.

In *S. T. 896, 1941-1 C. B. 252 (1940)* it is admitted that *Clawson & Bals, Inc., supra,* was contrary to existing administrative rulings. Appellant's own argument should prove a boomerang to it.

CONCLUSION.

It is submitted that the evidence and the law supports the findings and conclusions of law and the opinion of the trial court and that the judgment should be affirmed.

Dated, San Francisco,
August 20, 1941.

Respectfully submitted,
ADOLPHUS E. GRAUPNER,
Attorney for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Revenue Act of 1932—Section 606: Tax on Automobiles, etc.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(a) Automobile truck chassis and automobile truck bodies (including in both cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 2 per centum. A sale of an automobile truck shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(b) Other automobile chassis and bodies and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) except tractors, 3 per centum. A sale of an automobile shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether

or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this subsection shall not apply in the case of sales of parts or accessories by the manufacturer, producer, or importer to a manufacturer or producer of any of the articles enumerated in subsection (a) or (b). If any such parts or accessories are resold by such vendee otherwise than on or in connection with, or with the sale of, an article enumerated in subsection (a) or (b) and manufactured or produced by such vendee, then for the purposes of this section the vendee shall be considered the manufacturer or producer of the parts or accessories so resold.

TREASURY REGULATIONS 46, approved June 18, 1932:

Art. 4. *Who is a manufacturer or producer.*—As used in the Act the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufacturers or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, shall be liable for the tax under Title IV and not the person who buys and assembles a taxable article from such component parts.

Art. 41. *Definition of parts or accessories.*—The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term "parts and accessories" shall be understood to embrace all such parts and accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as parts and accessories regardless of the fact that fitting operations may be required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis or motorcycles, are considered parts or accessories for such articles whether or not primarily designed or adopted for such use.